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No. 139

In the Supreme Court of the United States

OCTOBER TERM, 1952

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which directed that respondent, an alien whose application for admission to the United States had been rejected by the Attorney General, be released from detention and permitted to enter the United States on bond.

OPINION BELOW

The opinions in the Court of Appeals (R. 60-67) have not yet been reported. The opinion of the District Court (R. 38-47) is reported at 101 F. Supp. 66.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1952 (R. 68-69). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien properly excluded from admission to the United States may be released from detention and permitted to reside in the United States under bond for an indefinite period solely because the United States has been unable to effectuate his departure.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 16-19.

STATEMENT

In October, 1951, respondent, an alien confined at Ellis Island, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking his release from detention on the ground that he had been confined since December, 1950, and there was no place to which he could be deported (R. 4-9).

From the petition, return, and opinion of the District Court, the following facts appear:

Respondent is an alien of uncertain antecedents whose parents were Hungarian or Roumanian (R. 39) but who claims to have been born in Gibraltar (R. 4). He resided in the United States from 1923

to 1948 (R. 4, 39).[1] In 1948 he left the United States, allegedly to visit his dying mother in Roumania, but never reached that country, because he was denied permission to enter (R. 4). He remained in Hungary for 19 months (R. 4-5).

Early in 1950, respondent left Hungary, after obtaining an immigration visa for entry into the United States as an immigrant (R. 5).[2] However, upon his arrival at New York, February 9, 1950, he was ordered temporarily excluded by an immigrant inspector pursuant to 8 C.F.R. 175.57 (R. 5, 10). After reviewing the evidence, the Attorney General on May 10, 1950 ordered that the temporary exclusion be made permanent without a hearing before a Board of Special Inquiry on the basis of evidence of a confidential nature, the disclosure of which would be prejudicial to the public interest (R. 5, 10). That determination was based on a finding that respondent's entry would be preju-

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[1] In his petition, respondent stated that he had been admitted for permanent residence (R. 4), but the District Court noted that the Government alleged that he had never been admitted for permanent residence (R. 39). At a hearing on the conditions of bail on remand of the cause pursuant to the mandate of the Court of Appeals, respondent admitted that he had not legally entered the United States.

[2] Respondent alleged that he is married to an American citizen (R. 4), but did not state, what the Immigration Service files show, that the marriage was entered into in Hungary in 1949, when he sought to return to the United States. Thus, it appears that the only relationship in the United States was a meretricious one. Moreover the court below is in error in stating that respondent has American children. On the hearing on the remand, he admitted that he has none. According to the Immigration Service files, respondent's wife has four children by a previous marriage, the youngest of which is 36 years old.

dicial to the public interest for security reasons (R. 11).

Efforts to execute the order of exclusion have thus far been unsuccessful. France has twice turned respondent back from its borders, taking the position that he had merely embarked there and refusing to accept him unless there was some assurance that he would be received in another country (R. 6, 18). On one of the trips to France, an effort was made to land respondent in the United Kingdom, but the British authorities likewise refused to take him, presumably because he did not appear to be a British citizen (R. 19, 21). The Immigration and Naturalization Service has sought to obtain travel documents on respondent's behalf from Hungary, but thus far the Hungarian government has not announced any decision on such application (R. 14). Respondent also has applied unsuccessfully for entry into 12 Latin American countries (R. 23-34), but alleges no effort on his own part to secure permission to enter Roumania or Hungary. After one of respondent's petitions for habeas corpus had been denied, in June, 1951, respondent told an officer of the Immigration Service that he intended to make no further effort to depart from the United States (R. 13).

In the meantime respondent has importuned the courts for his release. Three writs of habeas corpus were dismissed and a petition for a fourth writ was denied by the United States District Court for the Southern District of New York (R.

7-8). However, on October 22, 1951, a fifth habeas corpus proceeding was commenced and a writ was issued (R. 2-3).

After hearing, Judge Irving R. Kaufman held, on November 9, 1951, that the detention of Mezei apparently had been excessively prolonged and that he would sustain the writ of habeas corpus unless the Government permitted the court to examine the evidence against respondent *in camera* (R. 46-49). This the Government declined to do. On December 14, 1951, Judge Kaufman signed a final order sustaining the writ of habeas corpus and directing that Mezei be discharged on parole under certain conditions, including requirements that he report regularly and furnish a bond in the sum of $5,000 (R. 50-52).

On appeal, the United States Court of Appeals for the Second Circuit affirmed Judge Kaufman's order, holding that respondent was entitled to release because his detention had been excessively prolonged. It directed a reconsideration of the terms under which release was to be authorized. (R. 69.)[3] In his dissenting opinion Judge Learned Hand took the position that respondent, as an applicant for entry into the United States, could claim no constitutional rights and could not compel the United States to receive him, that his detention ashore instead of on the vessel was merely

[3] In conformity with the direction of the Court of Appeals, Judge Kaufman on May 2, 1952, issued a modified order which reduced the bail to the sum of $3,000 and permitted Mezei to travel and to reside in Buffalo, New York. Mezei has posted bail and has been released under the court's order.

a privilege granted him which conferred no status, and that the court had no authority to permit the entry of an alien whom the Attorney General had barred as potentially dangerous (R. 66-67).

REASONS FOR GRANTING THE WRIT

The decision below raises a very serious problem in the enforcement of the immigration laws, which has implications beyond the facts of this immediate case. The question is whether an alien properly excluded from the United States for any of the reasons specified by Congress must nevertheless be permitted physically to enter the United States and reside here for an indefinite period, whenever the United States is unable to effectuate his departure. Neither respondent nor the courts below question the propriety of respondent's exclusion;[4] the sole basis for his release is the fact that, in the period between his exclusion and the instant petition for habeas corpus, the United States has been unable to effectuate his departure.

Under this holding, therefore, any excludable alien who manages to get to our shores may nevertheless obtain most of the benefits of entry, if, for some reason, the country from which he comes re-

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[4] The well-established proposition, that an alien who voluntarily leaves the United States, even though resident here, is, upon his return, subject to the same rules of exclusion as on initial entry, has not been questioned in this case. See, *e.g.*, *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Hansen* v. *Haff*, 291 U.S. 559, 561-562; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Corsi*, 287 U.S. 129, 132; *Lewis* v. *Frick*, 233 U.S. 291, 297; *United States ex rel. Kwong Hai Chew* v. *Colding, et al.*, 192 F. 2d 1009 (C.A. 2), pending on writ of certiorari, No. 17, this Term.

fuses to take him back and no other country is willing to take him. Since ordinarily the most undesirable groups would have the greatest difficulty in securing acceptance by some other country, the result of the decision below may well be to foist on the United States the very aliens whom it is most desirable to exclude. Moreover, the decision below provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back.[5] Hence, the decision below very seriously affects the processes established by Congress for safeguarding the national security and enforcing the immigration laws.

We submit that there is no authority for the extraordinary relief granted by the court below. As Judge Learned Hand points out in his dissent (R. 66), respondent's rights must be judged as if he were still on board ship. Section 15 of the Immigration Act of 1917, 8 U.S.C. 151, commands immigration officers to conduct examinations on board a vessel and authorizes them to

> order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United

[5] Countries to which the alien had no prior relationship could not be expected to admit him.

> States from any of the obligations which, in case such aliens remain on board, would under the provisions of this Act bind the said vessels, transportation lines, masters, agents, owners, or consignees * * *

The transportation lines are relieved of the responsibility for safekeeping of such aliens only when they are temporarily detained in premises owned or controlled by the United States. Additionally, such transportation lines must "pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them."

Thus the statutory scheme provides for detention ashore only as an equivalent and a substitute for detention aboard the vessel.

An alien excluded from entry into the United States has thus, in legal effect, never reached the United States. The fundamental error in the decision below is that it treats exclusion as in the same category as deportation of an alien actually present in the United States. Concededly, if a resident alien's detention under an order of deportation is protracted for an unreasonable length of time he may be permitted to return to his former status—sojourn in the United States. *United States ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.). By the same reasoning, if there is unreasonable delay in executing an order of ex-

clusion, the alien likewise may insist on being permitted to return to his former status—residence or sojourn *outside* the United States. But he cannot insist on being awarded a privilege which is greater than his previous situation—the opportunity to enter the United States where such entry has been lawfully proscribed.

As this Court pointed out in *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542, 543, "an alien who seeks admission to this country may not do so under any claim or right. * * * it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." The courts have interceded in exclusion cases only to ascertain whether the order of exclusion was entered in conformity with law—on a ground specified by Congress and after a fair hearing, when Congress provided for such a hearing. *Gegiow* v. *Uhl*, 239 U.S. 3 (1915). There is no claim here that the procedures established by Congress have been violated; on the contrary the decision below does not question the propriety of the exclusion order. What the court is really doing is reviewing the method by which the political branch of the Government is executing its admitted power to keep out of the country a properly excluded alien. We submit that there is no warrant for such judicial intervention.

Congress has not extended to excluded aliens the right to release on bail. Pursuant to statutory authority, the executive branch of the Government

has determined that respondent's presence would be a menace to the safety of the country. We submit that in this field the courts have no power to overrule the determination of the legislative and executive branches of the Government. Respondent has no constitutional right to be admitted into the United States at all. He therefore has no constitutional right to be admitted even temporarily under bond. As Judge Galston said in denying bail in the case of *Kwong Hai Chew* v. *Colding*, 98 F. Supp. 717, 719, pending before this Court on writ of certiorari, No. 17, this Term, a case involving exclusion of an alien seaman who had previously been admitted for permanent residence:

> Granting of bail would, in effect, require the court to ignore the serious charges being pressed by the Government. Indeed a most illogical situation would arise if this court were to grant bail in this case, for it would mean that the relator, at least temporarily, would not be excluded from this country. In effect that would modify the order of the Attorney General, and this court has no power to do that. Where, as here, the executive branch of the government is authorized to exercise the power of exclusion of aliens for the best interests of the country during a time of national emergency, to ignore the determination of the executive, which determination is not subject to judicial review, would constitute an abuse of discretion.

Unquestionably, an unhappy situation is presented when an alien, properly barred from the

United States, cannot find another country to receive him. Nevertheless, since such alien has no right to enter the United States, it is not the duty of the United States to receive him merely because other countries do not extend to their citizens the rights which the United States accords to its own. It is not for the courts to admit into the United States, even under restrictions, aliens who Congress and the executive have determined should be excluded.

Certainly, the judgment of those authorized to exclude an alien should not, in any event, be set aside in a case in which it does not clearly appear that admission is the only alternative to a continuous limbo status at the door of the United States. Though the court below assumed that all efforts to effect respondent's admission to another country had been exhausted, that is not the case at all. The place to which respondent could most reasonably expect to return is Hungary, and the record is barren of any suggestion that he ever has applied to that country. Significantly, when he desired to enter Hungary in 1948 he experienced no difficulties in obtaining official approval for entry into that country. Even though the United States has received no answer to its request that Hungary admit respondent (R. 14), past experience emphasizes the likelihood that respondent might well be found acceptable by Hungary, Roumania or other Iron Curtain countries, if he made a bona fide application for admittance. See *United States* v. *Spector*, 343 U.S. 169. The twelve Latin American

countries alleged to have rejected him patently have been marshalled for dramatic effect rather than because of any sincere expectation that they would receive him. Any alien not wanted here could probably find 50 other countries which would *not* accept him. And, most significantly, respondent has declared that he would "make no further effort to depart from the United States and would do nothing except to attempt to remain in this country." (R. 13.)

Whether detention in a case of this sort has been so unreasonably prolonged as to justify admission is a question that must be answered in terms of the purpose of that detention. The majority opinion below observes (R. 61) that "the power to hold can never be broader than the power to remove *or shut out.*" (Emphasis added.) However, the court later ignores its own formulation in declaring that continued detention "is justified only as a means necessary to carry out his lawful removal from the country" (R. 62). The latter declaration overlooks the equally important purpose—to shut out aliens whose admission would be improper under the policies formulated by Congress and the executive. As the return in this case stated, "The relator is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice" (R. 13).

If respondent were now applying for admission, he could validly be excluded in the interests of

national security. His continued detention to prevent his entry is therefore justified in the interests of national security. So long as the finding that his entry would be prejudicial to the United States is outstanding, detention cannot be characterized as unreasonably prolonged regardless of how long it continues. See *Ludecke* v. *Watkins*, 335 U.S. 160; *Schwarzkopf* v. *Uhl*, 137 F. 2d 898 (C.A. 2); *Carlson* v. *Landon*, 342 U.S. 524. The mere fact that confinement has extended over a protracted period does not in itself warrant intervention by the courts. Thus an alien enemy interned during time of war hardly could make a tenable complaint that his confinement must be ended because it had extended over a period of months, or even years. *Id.* And a person barred from his home and usual occupation in a critical war zone likewise could not demand relief merely by invoking the calendar. *Korematsu* v. *United States*, 323 U.S. 214. It is only when confinement is prolonged beyond the needs defined by Congress that the detention of an excluded alien may become unreasonable. And in a security exclusion case, stemming from the mandate of Congress and the President, it cannot be unreasonable to continue detaining an excluded alien for the purpose of debarring him from the United States so long as his entry continues to be a menace to the safety of the United States.

The view of the district court (R. 46-47), for which the court below appears to have had some sympathy, was apparently that even when the original exclusion was properly ordered upon con-

fidential information which could not be revealed to the court, such information must nevertheless be made available to the court so that it could review the administrative determination to continue the alien's detention. However, the same considerations which preclude judicial review of the initial determination to exclude, (see *Knauff* v. *Shaughnessy*, 338 U.S. 537), preclude judicial review of the determination to continue exclusion. The court below seems to have assumed that because the confidential information could not be revealed, it was insubstantial, and it seems to have accepted respondent's self-serving statement that the primary ground for his detention was his membership in the International Workers Order (R. 5-6). Aside from the fact that respondent's petition can hardly be characterized as wholly candid (see *supra*, pp. 11-12), it is evident that the court was not justified in assuming arbitrary action by the executive. Nor was the court below warranted in assuming that admission would be proper because federal investigating agencies continue in operation. Congress has determined that investigative agencies should be spared the burden of being required to watch potentially dangerous aliens who have no right to be here at all. Congress has left it to the executive to determine who should be excluded in the interests of national security. The courts are neither authorized nor sufficiently informed, in the nature of things, to override that determination. As this Court said in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111, in de-

scribing the need for preserving the confidential character of the information on which executive action in this field frequently must rest:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

It is the province of Congress and the executive to determine whether an alien should be excluded. The court below had no authority indirectly to overrule that determination by admitting, even under restrictions, an alien properly found to be excludable.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1952.

Section 15 of the Immigration Act of 1917, 39 Stat. 885, as amended, 8 U.S.C. 151, provides:

That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would under the provisions of this Act bind the said vessels, transportation lines, masters, agents, owners, or consignees: *Provided*, That where removal is made to premises owned or controlled by the United States, said vessels, transportation lines, masters, agents, owners, or consignees, and each of them, shall, so long as detention there lasts, be relieved of responsibility for the safekeeping of such aliens. Whenever a temporary removal of aliens is made the vessels or transportation lines which brought them and the masters, owners, agents, and consignees of the vessel upon which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the aliens' eligibility to enter the United States and until they are either allowed

to land or returned to the care of the line or to the vessel which brought them, such expenses to include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and transfer to the vessel in the event of deportation, * * *.

Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful —
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *

In executing the powers conferred by the Passport Act of 1918, as amended, the President promulgated Proclamation No. 2523 of November 14,

1941, 6 F. R. 5821, 55 Stat. (Part 2) 1696, as amended August 17, 1949, by Proclamation 2850, 14 F. R. 5173, which precludes the admission to the United States of any alien "if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States."[6]

Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations.

8 C. F. R. 175.57 provides:

> *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the

[6] Although the war with Japan ended April 28, 1952, the powers exercised under the Passport Act of 1918, as amended, have specifically been preserved by Congress. See Public Laws 313, 368 and 393, 82nd Cong., 2d Sess.

alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

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